Public Investors Arbitration Bar Association

May 18, 2012

Via Email Only
pubcom@finra.org

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

Re: Regulatory Notice 12-18, *In re* Expungement Procedures

Dear Ms. Asquith:

Thank you for the opportunity to comment on the proposal to adopt *In re* Expungement Procedures. I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"). PIABA is a bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums. Our members and their clients have a strong interest in FINRA rules relating to both investor protection and disclosure. PIABA is generally supportive of FINRA's efforts to adopt the newly proposed *In re* Expungement Procedures, however, PIABA has certain concerns that should be addressed before an *In re* rule is finalized.

In 2009, FINRA adopted changes to the forms U4 and U5 which closed a loophole regarding the public reporting of customer complaints. Allegations of wrongdoing are no longer omitted from a broker's CRD simply because the broker was not named as a respondent in a Statement of Claim. While this was an important and necessary change to promote accurate public disclosure of sales practice complaints, PIABA appreciates that this change has created issues for non-named parties who have a legitimate right to seek expungement. PIABA is concerned that without a well defined procedure in place, brokers may seek to intervene in pending arbitrations, or worse file new arbitrations which name the customer as the respondent. As a consequence, PIABA believes that the proposed *In re* process is necessary to address these and other issues to adequately protect the rights of investors and preserve the integrity of the dispute resolution process.

PIABA supports the establishment of a separate *In re* proceeding for non-named parties. Separating the expungement process from the hearing of the customer's arbitration claims ensures that requests for expungement are considered only after a resolution of the underlying claim. The proposed rule correctly limits the rights of parties from seeking any relief beyond expungement

in an *In re* proceeding. Public customers are also best served by eliminating the possibility that brokers might name them as a respondent in a later expungement proceeding. The proposed rule also strikes the right balance in imposing a time limitation on expungement requests. These are positive steps which address unintended gaps in the present system.

PIABA is concerned about proposed Rule 13807(c) which requires brokers to notify FINRA of their intention to file for expungement relief. On page five of Regulatory Notice 12-18 it states that "The Notice of Intent to File would alert FINRA staff and the arbitrators on the underlying customer case to prepare for a possible *In re* claim." While FINRA staff should be alerted, PIABA believes that it is anti-investor and an unnecessary intrusion to provide notice at this stage to the arbitrators. The issue of expungement is not for consideration by the arbitrators until the underlying case is resolved. Some might argue that notice to the arbitrators should be given so that arbitrators retain documents and notes from the underlying arbitration. There are however better alternatives such as instructing all arbitrators to retain documents and notes for a certain period following the conclusion of an evidentiary hearing. PIABA also believes that the final rule ***and*** subsequent arbitrator training should make it clear that all parties in the underlying would receive timely notice when the broker has filed a notice of intent and also when a broker files the actual *In re* statement of claim.

PIABA is also concerned about the possible burden *In re* proceedings may place on customers including the possibility that a customer might be compelled to testify and produce documents. During the settlement process, all parties bargain for closure and finality. Not every settlement reflects the merits of the dispute. Cases settle for various reasons, including health and personal issues that a customer may not wish to disclose or make public. Notwithstanding, customers may be forced to appear in the *In re* proceeding, subjecting them unnecessarily to the rigors of preparing for and giving sworn testimony to an arbitration panel, in a matter that they believed had been resolved. This is especially troubling because many customers who bring arbitration claims are senior citizens, some of whom may have considered avoiding the stress and the associated health risks as a reason for pursuing settlement rather than proceeding to a hearing. It would be inequitable to force customers to appear in person and defend themselves at an expungement hearing. PIABA appreciates the attempts to limit discovery and testimony, however, a final rule ***and*** subsequent arbitrator training must make it clear that *In re* proceedings are not full blown arbitration hearings.

Many requests for expungement continue to be rubber stamped by panels, especially when unopposed. Customers that do wish to participate should be provided every opportunity to appear at the *In re* proceeding to oppose an expungement request. Truthful reporting of customer complaints is a cornerstone of fair and effective disclosure. Regardless of whether a customer appears, PIABA believes that both the final rule ***and*** subsequent training should instruct arbitrators that no inference should be made from a failure of customer or brokerage firm to appear at an *In re* hearing.

PIABA is generally supportive of FINRA's attempts to address the issues that have arisen through necessary revisions to public reporting requirements. We look forward to FINRA's revisions and commenting on a final rule.

Very truly yours,

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